defendant in addition to holding rightful possession of the surface has also unlawfully taken some of the minerals. Here again, however, unless the defendant has color of title to the minerals, it is difficult to conceive how his possession can extend beyond that part which he has actually mined.[14]

A striking similarity to the foregoing rules, seldom directly recognized in the authorities, appears in the principles governing the acquisition of rights by prescription. The basis of the doctrine is that from such long-continued use, acquiesced in by the owner of the servient tenement, the existence of a lost grant is presumed.[15] The user relied upon must be continuous, and adverse, and open,[16] for the owner of the servient tenement cannot be said to have acquiesced in a use which is not such as to have given him notice. The difficulty chiefly arises in two situations. In cases of intermittent user, it is submitted that an application of the same rule, that of notice, which here would be implied from the frequency of the user, will furnish the solution.[17] Thus the use of water during certain months of the year for irrigation may be sufficient to create the right,[18] as likewise a continued taking of ice during the winter months.[19] A second and similar question is the determination of the extent of such a right. It is commonly said that this is measured by the user in which it originated,[20] but the extent of the user is clearly no more than evidence of the terms of the fictional lost grant,[21] and the right can therefore extend only so far as it has been brought by the user to the notice of the presumed grantor, whose acquiescence can only so far be implied. Thus, for instance, where a dam has been built the right to flood the land of another is limited to that which has actually been flooded during the prescriptive period, and does not extend to all land which the dam is capable of flooding.[22] It therefore appears that the same rule governs the acquisition of incorporeal rights by prescription as applies to the acquisition of corporeal rights by adverse possession: namely, that the acts relied on to constitute prescription must be such as reasonably to warn the owner of the servient tenement of the character and extent of the use which is being made of his land.[23]

DUTY OF LANDOWNERS TO TRESPASSING CHILDREN.—The common-law duty of an owner[1] of land to a trespasser is to refrain from inflicting upon him willful or wanton injury.[2] In order not to violate this

[14]French *v.* Lansing (N. Y. Supreme Court, 1911); not yet reported.

[15]Washburn, Real Property, (6th ed.) §§ 1253, 1254.

[16]Lewis *v.* N. Y. & Harlem R. R. Co. (1900) 162 N. Y. 202.

[17]Bunten *v.* Chicago, etc. R. R. Co. (1892) 50 Mo. App. 414; Bodfish *v.* Bodfish (1870) 105 Mass. 317.

[18]Hesperia Land & Water Co. *v.* Rogers (1890) 83 Cal. 10.

[19]See Hinckel *v.* Stevens (N. Y. 1898) 35 App. Div. 5.

[20]8 COLUMBIA LAW REVIEW 401.

[21]Wimbledon Conservators *v.* Dixon (1875) 1 Ch. R. 362.

[22]Mertz *v.* Dorney (1855) 25 Pa. 519; Gilford *v.* Winnipiseogee Lake Co. (1872) 52 N. H. 262.

[23]Washburn, Real Property, (6th ed.) § 1253.

[1]The term "owner" will be used to denote the one responsible for acts done on the land.

[2]Burdick, Torts, (2nd ed.) 343.

rule and yet to hold the proprietor answerable for injuries sustained by children attracted to and injured by something on the premises, some courts have resorted to a legal fiction, whereby the maintenance of the alluring thing is arbitrarily construed as an implied invitation to infants to enter and play,[3] though it may clearly appear that the presence of children would materially hinder the ordinary user of the dangerous contrivance and would hence seem most objectionable to the owner. Again, the act of the landowner in introducing or maintaining the object unguarded, though knowing or having reason to know that children may enter and be injured unless it be made safe, is transformed by other courts into a willful and intentional wrong.[4] This construction, which is clearly contrary to fact, is evolved through a failure to distinguish between knowledge and intent[5] and between deliberate wrong and negligence.[6] The confusion in some of the decisions is increased by the fact that the child seems to be regarded simultaneously as invitee and trespasser.[7] Still other tribunals have preferred to establish the landowner's liability by application of the maxim *"sic utere tuo ut alienum non lædas,"*[8] but they fail to point out what legal duty has been violated, apparently confusing physical with legal injury. It should furthermore be noted that the maxim seems to be properly applicable only to a user which produces injury outside the land on which it was made.[9] It has also been suggested that a proper principle on which to hold the landowner liable is, that though there is substantially the same duty toward children and adults to keep the land near a highway safe, yet child trespassers, allured by some attraction, should be allowed wider limits of deviation than adults.[10] But the liability of the landowner in this instance is grounded solely on the policy of making the highway safe for travel,[11] and cannot legitimately be extended to cases where the child did not enter the premises from a highway or where the alluring thing was at a great distance from it, even though the landowner might have reason to foresee the injury to children. Though the liability of landowners to children, in some of the jurisdictions which recognize it, has been strictly limited to injuries caused by certain types of machinery,[12] yet on one theory or another it has been established in the majority of the United States. In others, however, it has been altogether denied.[13] It is submitted, however, that the true doctrine is

[3]Chicago, etc. R. R. Co. *v.* Fox (1906) 38 Ind. App. 268.

[4]Keffe *v.* Milwaukee & St. Paul Ry. Co. (1875) 21 Minn. 207.

[5]11 Harv. L. Rev. 349, 354.

[6]Walker's Adm'r *v.* Potomac, etc. R. R. Co. (1906) 105 Va. 226, 231.

[7]Keffe *v.* Milwaukee & St. Paul Ry. Co. *supra.*

[8]Barrett *v.* Southern Pacific Co. (1891) 91 Cal. 296.

[9]Frost *v.* R. R. (1886) 64 N. H. 220; Walker's Adm'r *v.* Potomac, etc. R. R. Co. *supra.*

[10]1 Beven, Negligence, (3rd ed.) 165, 6.

[11]Hadley *v.* Taylor (1865) L. R. 1 C. P. 53; Mullaney *v.* Spence (N. Y. 1874) 15 Abb. Prac. [N. S.] 319.

[12]Ratte *v.* Dawson (1892) 50 Minn. 450.

[13]Frost *v.* R. R. Co. (N. H.) *supra;* Daniels *v.* N. Y. & N. Eng. Ry. Co. (1891) 154 Mass. 349; Walsh *v.* Fitchburg R. R. Co. (1895) 145 N. Y. 301; Turess *v.* N. Y., etc. R. R. Co. (1898) 61 N. J. L. 314; Ryan *v.* Towar (1901) 128 Mich. 463; Wilmot *v.* McPadden (1906) 79 Conn. 367; Walker's Adm'r *v.* Potomac, etc. R. R. Co. (Va.) *supra;* Bottum's Adm'r *v.* Hawks (Vt. 1911) 79 Atl. 858.

not fully expressed by either of these lines of cases. Just as under the common-law duty first stated a landowner setting spring-guns[14] and traps[15] with intent to injure trespassers is liable as for willful injuries, so it would seem that where he knows or ought to know from the character of the neighborhood and the inherent danger, attractiveness and accessibility of something on his land that children will, to a practical certainty, trespass and be injured thereby, his conduct in failing to take reasonable steps to guard against the injury is wanton and he should be answerable in damages.[16]

An objection to the recognition of such a duty seems to be that the beneficial use of land is a necessity and that such use cannot be thus restricted without very substantial damage to the landowner,[17] since he will practically be made an insurer of infants trespassing on land which has alluring improvements.[18] This result does not seem fairly to follow from the rule, since the liability of the landowner, far from being absolute, is dependent on the reasonableness of his conduct and the practical certainty of the injury. The objection that the jury would be prejudiced in favor of the injured child[19] does not seem to have more force than in other cases arising from negligence, and, as has frequently been done in applying the broader "turntable doctrine," if the verdict is contrary to the evidence, on motion refused, it may be set aside on appeal.[20]

In the recent case of *Nashville Lumber Co.* v. *Busbee* (Ark. 1911) 119 S. W. 301, where a child was killed in the lumber yard of the defendant by an unguarded moving chain, the doctrine of the "turntable cases" was approved, and it was held that, conceding the infant to be a trespasser, the question of the defendant's negligence was nevertheless for the jury. The refusal to find error in the action of the lower court in excluding evidence of a warning given by defendant to the child's parent prior to the accident does not seem justifiable even under the doctrine of the cases approved in the decision, since it might have been important in determining the reasonableness of the defendant's conduct, and of course under the doctrine herein submitted, it would properly have been admissible, as affecting the question of wantonness.

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[14]Bird *v.* Holbrook (1828) 4 Bing. 628.

[15]Townsend *v.* Wathen (1808) 9 East 277.

[16]Young *v.* Harvey (1861) 16 Ind. 314. The defendant dug a well on his unfenced land near a common. A trespassing horse fell into it and was killed. The defendant was held liable, since the probability of injury "was so strong as to make it the duty of the owner of the lot as a member of the community to guard that community from the damages to which the pit exposed its persons and property." See Brown *v.* Lynn (1858) 31 Pa. 510; Blyth *v.* Topham Cro. Jac. 158, 9; Busch *v.* Brainard (N. Y. 1823) 1 Cow. 78.

It would seem that the idea of wantonness lies at the foundation of the landowner's liability to trespassers for injuries inflicted by dangerous animals. See Marble *v.* Ross (1878) 124 Mass. 44; Loomis *v.* Terry (N. Y. 1837) 17 Wend. 496.

[17]11 Harv. L. Rev. 349, 363.

[18]Wheeling, etc. R. R. Co. *v.* Harvey (1907) 77 Oh. St. 235; Burdick, Torts, (2nd ed.) 467.

[19]Ryan *v.* Towar *supra*, 471; 11 Harv. L. Rev. 349, 439.

[20]St. Louis, etc. R. R. Co. *v.* Bell (1876) 81 Ill. 76.